

**Board of Contract Appeals**  
General Services Administration  
Washington, D.C. 20405

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August 6, 2003

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GSBCA 16136-RELO

In the Matter of EMMA JANE MEDINA

Emma Jane Medina, Salina, KS, Claimant.

Jack L. Crews, Chief Financial Officer, Natural Resources Conservation Service,  
Department of Agriculture, Washington, DC, appearing for Department of Agriculture.

**BORWICK**, Board Judge.

Background

The agency, the Department of Agriculture, through its Natural Resources Conservation Services, requests a decision under 31 U.S.C. § 3529 (2002). The agency asks: "What relocation allowances is an employee transferring from a DoD [Department of Defense] non-appropriated funds entity to a civilian agency eligible for?" The agency's question arose when the agency hired claimant, Emma Jane Medina, who had been employed by a DoD non-appropriated fund instrumentality (NAFI)--the European and Pacific Stars and Stripes (Stars and Stripes).

The chronology of events is as follows. Claimant, whose duty station was Washington, D.C., was an employee of Stars and Stripes. On November 20, 2002, effective December 2, 2002, Stars and Stripes separated claimant, for business reasons, from her position. About one month before claimant's separation, claimant had applied for a position with the Department of Agriculture in Salina, Kansas, under an interchange agreement between the Office of Personnel Management (OPM) and DoD.

The vacancy announcement for the agency position stated that the selected individual would be eligible for relocation allowances as prescribed in the Federal Travel Regulation (FTR). On March 24, 2003, claimant was notified by telephone of her selection for the position in Salina, Kansas; claimant was appointed to the position on April 21. Before the notification, however, claimant made arrangements to sell her residence in the Washington, D.C., area and, on March 23, she contracted with a mover to move her household goods.

At this point, we must briefly describe the purpose of an interchange agreement. Under 5 CFR 6.7 (2002), OPM and an establishment having a merit system, such as a DoD

NAFI, may enter into an agreement prescribing the conditions under which employees may move between the competitive civil service system and the other merit system. OPM has entered into such an agreement with the DoD NAFIs. An employee may move from a NAFI to an agency within the competitive civil service system upon certain conditions. One condition is that the employee is currently serving in the other merit system or has been involuntarily separated from that other system. In the case of an employee so separated, the employee must be appointed to the competitive civil service within one year of the involuntary separation.

The interchange agreement also lists statutory and regulatory provisions governing transfer of pay, retirement, leave, and health benefits when an employee moves between merit systems. Relocation benefits are not mentioned in the interchange agreement.

The agency posed its question because, upon its review of the interchange agreement, the agency correctly noted that the interchange agreement "address[es] appointment criteria and requirements but does not address eligibility regarding relocation allowances."

### Discussion

For the purposes of relocation benefits, statute provides that an "agency" means an executive agency and an "employee" means an individual employed in or under an agency. 5 U.S.C. § 5721(1)(A), (2) (2000).

Consistent with the statutory definition in 5 U.S.C. § 5721, for the purpose of its relocation provisions, the FTR defines "agency" to include:

- (1) An executive agency as defined in Title 5, U.S.C. 105 (an executive department, an independent establishment, the General Accounting Office, or a wholly owned Government corporation as defined in section 101 of the Government Corporation Control Act, as amended (31 U.S.C. 9101), but excluding a Government controlled corporation);
- (2) A military department.

41 CFR 300-3.1.

The DoD defines a NAFI as:

An integral DoD organizational entity that performs an essential Government function. It acts in its own name to provide or to assist other DoD organizations in providing MWR [morale, welfare, and recreation] programs for military personnel and authorized civilians. It is established and maintained individually or jointly by the Heads of DoD Components.

DoD Directive 1015.1, ¶ E2.2.2 (1981).

The Stars and Stripes are newspapers published by the United States European and United States Pacific Commands. 32 CFR 246.4(a). Each Stars and Stripes (European and Pacific) is to be administered as a joint-service NAFI of the respective command. 32 CFR 246.4(c). Funding is provided through newspaper sales, resale of commercial publications, authorized advertising, job printing, and appropriated fund support. Id.

The Supreme Court has suggested that unless hired by contract, "employees of nonappropriated-fund activities, when performing their official duties, are employees of the United States." United States v. Hopkins, 427 U.S. 123, 128 (1976); see also Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982). This conclusion is made particularly applicable to claimant's situation by the provision of 5 U.S.C. § 5721 which defines an "employee," for the purpose of relocation benefits, as an individual employed in or under an agency. The conclusion is additionally supported by the definition of "employee" in 5 U.S.C. § 2105 which applies generally to Title 5 of the United States Code. That section defines an "employee" as an officer or individual appointed in the civil service by any one of a number of officials, including another "employee," who is "engaged in the performance of a Federal function." Section 2105(c) of title 5, however, provides that employees of DoD NAFIs are not employees of the purpose of laws administered by the Office of Personnel Management" (with certain exceptions including interchange agreements) and other specified Chapters of Title 5. The relocation provisions are in 5 U.S.C. ch. 57, subch. II, and those provisions are administered by the Administrator of General Services, not the Office of Personnel Management. 5 U.S.C. § 5738. Further, Chapter 57 of Title 5, is not included in the list of chapters from which employees of DoD NAFIs are exempt.

The regulation regarding Stars and Stripes makes explicit that employees of that organization are employees of DoD. 32 CFR 246, app. C, ¶ A.2. Since DoD is clearly an "agency," for the purpose of the relocation benefit statutes and regulations, employees of Stars and Stripes, including claimant, are clearly employees of an agency.

The General Accounting Office (GAO) held that an employee of a DoD NAFI transferred to another agency was not entitled to relocation expenses because the NAFI was not an appropriated fund entity. John E. Seagriff, B-215398 (Oct. 30, 1984). In Kenneth A. Hack, GSBCA 15758-RELO, 02-2 BCA ¶ 31,926, at 157,737, however, we held that the reasoning in Seagriff as it pertained to our jurisdiction over NAFI employees seeking relocation benefits, even if correct when written, is no longer correct in light of current statutes. For the reasons above, we think Seagriff's reasoning is erroneous as it pertains to whether employees of Stars and Stripes who transferred to another agency are entitled to relocation benefits under the FTR.

The answer to the agency's question, therefore, is that claimant, as a recently separated DoD employee, is entitled to the authorized and allowable relocation expenses under the FTR. Claimant was hired by the agency within one year of her separation from DoD and thus comes within the FTR's definition of a transferred employee.

Under the FTR, an employee is eligible for relocation expense allowances if the employee transfers in the interest of the Government from one agency duty station to another

for permanent duty and the old duty station is at least fifty miles distant from the new duty station. 41 CFR 302-1.1(b). A transferred employee is one who transfers from one official station to another and includes employees who were separated as a result of a reduction in force, but re-employed within one year of separation. 41CFR 302-3.100. When an employee transfers between agencies, the gaining agency pays all the expenses of relocation; in case of a reduction in force, the gaining and losing agency may agree to split the cost of relocation. 41 CFR 302-2.105.

The specific issue of concern to the agency at this juncture seems to be the sale of claimant's residence at claimant's old duty station. The agency notes that claimant sold her house before she was officially notified of her selection for the agency position. As to that sale, the agency must evaluate whether the sale of the residence was incident to claimant's transfer, or whether the sale was for personal reasons. See 41 CFR 302-11.305; Connie F. Green, GSBCA 15301-RELO, 01-1 BCA ¶ 31,175.

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ANTHONY S. BORWICK  
Board Judge